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NO. 345

IN THE

Supreme Court of the United States

October Term 1964

CLEM McCLELLAND, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Clem McClelland, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas in the above entitled cause.

OPINIONS OF THE COURT BELOW

The Opinion and judgment of the Court of Criminal Appeals of Texas in the above entitled cause is reported as *McClelland v. State of Texas*, 389 S.W.2d 678; a copy is attached as Appendix "A" (Pages 25 to 33). The Opinion

in a companion case, reference to which is necessary to ascertain the grounds of the judgment, is reported as *McClelland v. State of Texas,* 373 S.W.2d 674. Copy of this Opinion is attached as Appendix "B" (Pages 34 to 63).

The judgment of the trial court which was affirmed by the Court of Criminal Appeals is attached as Appendix "C" (Pages 64 to 65).

GROUNDS OF JURISDICTION

The judgment and decree sought to be reviewed was handed down and entered by the Texas Court of Criminal Appeals on January 6, 1965. First and Second Motions for Rehearing were timely filed and were finally overruled on April 21, 1965, on which date the judgment became final. The mandate issued on May 21, 1965. These facts are confirmed by certificate of the Clerk of the Court of Criminal Appeals, attached as Appendix "D" (Page 66).

Jurisdiction of the Supreme Court of the United States of America is invoked under 28 U.S.C.A., Sec. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

The trial court refused to take evidence on Petitioner's Motion to Quash the Indictment, in which Motion Petitioner asserted deprivation of rights guaranteed to him by Amendments V, VI and XIV to the Constitution of the United States; he alleged that as a part of the grand jury proceedings the prosecuting attorney prior to indictment purposefully and intentionally instituted and conducted a televised public examination of the grand jury witnesses, and the Petitioner; that in these proceedings Petitioner, though bearing the status of an accused, was expressly denied the right to defend, the right to be represented by his retained

counsel, the right to cross-examine, the right of confrontation, the right of compulsory process, and the right to contradict and to rebut; that such proceedings were contrary to the traditions inherent in grand jury proceedings and guarantee of indictment by a grand jury; that such procedures had never before been used by the State in a felony prosecution; and that the proceedings were conducted over Petitioner's express and repeated objections and claims of Constitutional prohibitions. The questions presented as to these procedures are:

I. Whether Petitioner was entitled to make proof of these procedures described in his Motion to Quash under the rule of *Coleman v. Alabama*, 377 U.S. 129, 84 S.Ct. 1152, and *Carter v. Texas*, 177 U.S. 442, 20 S.Ct. 687.

II. Whether the rule of *Coleman v. Alabama*, 377 U.S. 129, 84 S.Ct. 1152 and *Carter v. Texas*, 177 U.S. 442, 20 S.Ct. 687, that a Defendant is entitled to make his proof in support of claims of Federal Constitutional right, is limited to racial discrimination cases.

III. Whether these procedures described in the Motion to Quash show a denial of due process of law as guaranteed to Petitioner under Amendments V and XIV of the Constitution of the United States.

IV. Whether these procedures described in the Motion to Quash show a denial of the equal protection of the laws as guaranteed to Petitioner by Amendment XIV to the Constitution of the United States.

V. Whether these procedures described in the Motion to Quash show a denial to Petitioner of traditional grand jury procedures within the concept of the right to indictment of a grand jury as guaranteed to him by Amendment V to the Constitution of the

United States and Article I, Section 10 of the Constitution of the State of Texas.

VI. Whether the traditional rule prescribing secrecy of grand jury proceedings has as one of its purposes the protection of the accused against pre-indictment public examination of the grand jury witnesses in a proceeding in which the accused is denied the right to defend, to be represented by counsel, to cross-examine, to compulsory process, or to rebut.

VII. Whether these procedures described in the Motion to Quash are prohibited by the rule of *Estes v. Texas*, ____ U.S. ____, 85 S.Ct. 1628.

VIII. Whether the Federal standard for grand jury procedures for protection of an accused applies to a state whose Constitution guarantees the protection of indictment by a grand jury.

IX. Whether the procedures described in the Motion to Quash show a use by the prosecution of the inquisitorial system of criminal justice.

X. Whether in a Court of Inquiry under *Vernon's Tex. Code of Cr. Proc.*, Arts. 886 and 887, when the proceedings are publicly conducted and televised on the instigation of the prosecuting attorney, a person having the status of an accused is entitled under the Constitution of the United States to defend, to be represented by counsel, to cross-examine, to confrontation, to compulsory process, and to contradict and rebut.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the *Constitution of the United States*, the pertinent provisions of which provide as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury * * * nor be deprived of life, liberty or property, without due process of law."

Amendment VI to the *Constitution of the United States*, the pertinent provisions of which provide as follows:

> "In all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Amendment XIV, Sec. 1, to the *Constitution of the United States*, the pertinent provisions of which provide as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Art. I, Section 10 of the *Constitution of the State of Texas* which provides as follows:

> "In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process

> for obtaining witnesses in his favor, * * * and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger. As amended Nov. 5, 1918."

Vernon's Texas Code of Criminal Procedure, Art. 886, which provide as follows:

> "When a justice of the peace has good cause to believe that an offense has been, or is about to be, committed against the laws of this State, he may summon and examine any witness in relation thereto. If it appears from the statement of any witness that an offense has been committed, the justice shall reduce said statements to writing and cause the same to be sworn to by each witness making the same; and, issue a warrant for the arrest of the offender, the same as if complaint has been made and filed."

Vernon's Tex. Code of Crim. Pro., Art. 887, provides:

> "Witnesses summoned under the preceding article who shall refuse to appear and make a statement of facts, under oath, shall be guilty of a contempt of court, and may be fined not exceeding one hundred dollars, and may be attached and imprisoned until they make such statement."

STATEMENT OF THE CASE

The Federal questions were raised in the Court of first instance by Petitioner's Motion to Quash the Indictment (Tr. 12 to 24), and by Petitioner's Motion for New Trial (Tr. 145 to 175). They were raised in the Court of

Criminal Appeals by Petitioner's Bill of Exceptions No. I (Tr. 194 to 261), by filing with the Clerk of said Court a transcript containing the Motions to Quash and for New Trial, and by exhaustive briefs on the points followed by two Motions for Rehearing.

Petitioner's Motion to Quash is attached hereto as Appendix "E". (Pages 67 to 80). It duly set up denial of rights guaranteed by the Constitution of the United States. Detailed description of the allegations is herewith set forth at Pages 8 to 10.

When the Motion to Quash came on to be heard, on objection by the State, the trial court refused to hear any evidence on the Federal questions alleged, and summarily overruled the motion:

> "*The Court*: All right, gentlemen, I am sustaining the State's objection and will not hear evidence on the motion to quash. Motion to quash is overruled." (Tr. 221).

Thereupon Petitioner's counsel endeavored to make proof on the allegations for the purpose of a Bill of Exceptions, that the issue might be reviewed by the Appellate Courts. Again, on objection of the State, the trial court refused to permit Petitioner to make proof even for a Bill of Exceptions, notwithstanding Petitioner's counsel expressly advised such denial would prevent a full record for Appellate review:

> "*Mr. Smith*: If the Court please, without making our Bill, we could not protect our record (Tr. 222). * * * If the Court please, our position is this: under any circumstances, we are entitled to show what the facts would be in order to enable the Appellate

Court to pass upon whether or not the facts as developed constitute proper grounds for setting aside the indictment." (Tr. 223)

"*The Court*: Counsel, I believe that if any appellate action be needed, you will be fully protected in your verified motion and the overruling thereof is your exception thereto." (Tr. 224)

The allegations of the Motion to Quash set forth that the Petitioner endeavored to prove that all Anglo-American concepts of traditional grand jury procedures were violated by televised public examination of the grand jury witnessess, and the Defendant, in a public proceeding, in which Petitioner, though bearing the status of an accused, was expressly denied the assistance of his Counsel and the right in any way to defend. The allegations are summarized as follows:

In May of 1962 Petitioner was the duly qualified Judge of the Probate Court of Harris County, Texas. On May 7, 1962, the Grand Jury of Harris County, Texas, was duly impanelled, and during the month of May, 1962, in its usual and customary secret proceedings, began investigating the Petitioner and his conducting of the affairs of the Probate Court of Harris County, Texas. By June 1, 1962, the Grand Jury had not brought an indictment against Petitioner.

On June 5, 1962, the District Attorney of Harris County, Texas, Mr. Frank Briscoe, in cooperation with a Justice of the Peace, W. C. Ragan obtained an order for a so-called "Court of Inquiry" from the said Ragan for public examination of the grand jury witnesses and Petitioner without the right of Petitioner to the assistance of his

counsel or to defend. Thereupon the lawful and customary and traditional secret deliberations of the Grand Jury were postponed and delayed while the District Attorney pursued the "Court of Inquiry" in public before the said Justice of the Peace. The Petitioner expressly objected at every stage and through every lawful means to these unprecedented procedures, but over Petitioner's express objections the "Court of Inquiry" was held on June 14, 15, 16 and 18, 1962.

The "Court of Inquiry" was publicly conducted with all of the news media present and with the proceedings being broadcast by television and radio from the Courtroom. One or more members of the Grand Jury were in attendance on the "Court of Inquiry." Others were advised of the proceedings by the various news media. During the "Court of Inquiry" proceedings all of the State's witnesses against the Petitioner were publicity examined. During the "Court of Inquiry" proceedings the Petitioner himself, over his objection, was publicly examined.

Notwithstanding Petitioner bore the status of an accused in the proceedings and he and the grand jury witnesses against him were being publicly examined, before television cameras and radio recorders, Petitioner was expressly denied the right to defend and the assistance of his retained counsel in the proceedings. He was also expressly denied the right to confront the witnesses against him, the right to cross-examine the witnesses against him, the right to call witnesses in his own behalf, and the right to rebut and contradict the evidence produced by the prosecution.

Thereafter the Grand Jury was reconvened on June 20, 1962, whereupon it brought the indictment against Petitioner for a felony offense.

The Texas Constitution, Article I, Section 10, guarantees that felony offenses shall be prosecuted only on indictment by a grand jury.

The procedures used to bring this indictment had never before been used in a felony prosecution in Harris County, Texas, or any other County of the State of Texas.

The Motion to Quash further alleged that the unlawful procedures pursued denied Petitioner due process of law, the equal protection of the law, the right of Assistance of Counsel, the right of confrontation, the right of compulsory process for defense, and the right to specification of charges, all as guaranteed to him by Amendments V, VI and XIV to the Constitution of the United States. It additionally alleged that the procedures abridged his privileges and immunities as a citizen of the United States in violation of Amendment XIV to the Constitution of the United States.

The Court of Criminal Appeals disposed of the issue by the following statement in its Opinion of Affirmance:

> "We have, however, examined with care appellant's contention and adhere to the view expressed by the majority of this Court in appellant's former case, *McClelland v. State*, 373 S.W.2d 674, that the trial court's action does not constitute reversible error. This proposition is overruled." (See Appendix "A" at p. 31).

The cited earlier opinion (which reversed on other grounds) first held that the trial court erred because of the refusal to take evidence on the Constitutional claims. However, on Motion for Rehearing the majority concluded that the rule of *Coleman v. Alabama*, 377 U.S. 129, 84 S.Ct. 1152

and *Carter v. Texas*, 177 U.S. 422, 20 S.Ct. 687 applied only to racial discrimination cases:

> "However, I do not think these racial discrimination cases cited by Appellant are in point here." (See Appendix "B" at P. 53).

Appellant's two Motions for Rehearing were overruled without comment on the Federal issues.

REASONS FOR GRANTING THE WRIT

I.

In his Motion to Quash the Indictment Petitioner duly set up and claimed denial of rights guaranteed to him by the Constitution of the United States. The refusal of the trial court to hear evidence in support of the allegations was contrary to the express rulings by this Court in *Coleman v. Alabama*, 377 U.S. 129, 84 S.Ct. 1152 and *Carter v. Texas*, 177 U.S. 442, 20 S.Ct. 687. Both of these cases were reversed because the defendant "offered to introduce witnesses, to prove the allegations * * * and the (trial) court * * * declined to hear any evidence on the subject."

The effort of the Texas Court of Criminal Appeals to limit the rule of *Coleman* and *Carter* to racial discrimination cases is not harmonious with the recent decisions of the Supreme Court of the United States imposing Federal standards on the States in criminal prosecutions involving no racial issue. See *Griffin v. California*, ... U. S. ...., 85 S.Ct. 1229; *Stanford v. Texas*, ... U. S. ...., 85 S.Ct. 507; *Pointer v. Texas*, ... U. S. ...., 85 S.Ct. 1065; *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489; *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509; *Gideon v. Wain-*

wright, 372 U. S. 335, 83 S.Ct. 792; and *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684.

To approve the rationalization of the Texas Court of Criminal Appeals would be to sanction a device by which the States could circumvent the above holdings merely by denying proof of the facts. It would deny to the Supreme Court of the United States its independent prerogative to review the facts when Constitutional rights are asserted, a right heretofore jealously guarded. *Davis v. Weschler*, 263 U. S. 22, 44 S.Ct. 13 ("* * * the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice"); *Norris v. Alabama*, 294 U. S. 587, 55 S.Ct. 579 ("When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this court would fail of its purpose in safeguarding Constitutional right.") *Smith v. Texas*, 311 U. S. 128, 61 S.Ct. 164 ("But the question decided rested upon a charge of denial of equal protection, a basic right protected by the Federal Constitution. And it is therefore our responsibility to appraise the evidence as it related to this Constitutional right.")

In succeeding sections of the Argument Petitioner demonstrates that his Motion to Quash raised substantial Federal issues.

II.

Petitioner's Motion to Quash describes procedures of serious import to the due administration of criminal jus-

tice. By these procedures a prosecuting attorney circumvents the protections inherent in the constitutional guarantee of indictment by grand jury (guaranteed by Amendment V of the Constitution of the United States and Article I, Section 10 of the Texas Constitution), and in practical effect convicts the Defendant, before he is indicted, in a proceeding in which he is expressly denied the right to defend. It functions thus:

(1) The prosecutor brings about a recess of the grand jury and calls a "Court of Inquiry" with the cooperation of a Justice of the Peace.

(2) The prosecutor conducts the "Court of Inquiry" in public with all the news media present and with the proceedings being broadcast by television and radio. The grand jury witnesses, and the defendant, are publicly examined before the television cameras and the radio recorders.

(3) In these proceedings defendant is expressly denied representation by counsel, the right to in any way defend, the right to cross-examine, the right to rebut, and the right of confrontation.

(4) Thereafter the grand jury is reconvened, whereupon defendant is indicted, and then brought to formal trial.

After such procedures were pursued Petitioner's formal trial was a mockery for his conviction was already assured. There was little his counsel could do for him then. See *Rideau v. Louisiana*, 373 U. S. 723, 83 S.Ct. 1417; *Escobedo v. Illinois*, 378 U. S. 478, 84 S.Ct. 1758 and the dissent of Mr. Justice Black in *In re: Groban*, 352 U. S. 330, . . . , 77 S.Ct. 510, 515, approved in *Escobedo, supra.*

The wide spread pre-trial publicity by television, radio and newspaper destroyed all opportunity for Petitioner to obtain a fair trial. See *Estes v. Texas,* .... U. S. ...., 85 S.Ct. 1628, and *The Warren Commission Report on the Assassination of President John F. Kennedy* (Complete Doubleday Edition, Pages 12 and 231-242). In this connection, it should be noted that the publicity is alleged to have been instigated by the prosecuting attorney and not the result of the private enterprise of the news media. See *Delaney v. United States,* (1st Cir. 1952) 199 F.2d 107.

III.

The public examination of the grand jury witnesses and the Petitioner, without Petitioner's having the right to assistance of counsel and the rights to cross-examine, rebut, and defend is violative of all Anglo-American concepts of grand jury procedures. Counsel for Petitioner have found only two other cases where this factual situation was presented. *Shaftesbury's Case* (Bill of Indictment Against Anthony, Earl of Shaftesbury) State Trials, 33 Charles II (1681) (in which the grand jury refused to indict because the procedures were contrary to tradition), and *State v. Branch,* 68 N. Car. 186 (2d Ed. 68 N. Car. 133) (in which the indictment was quashed because of the procedures).

In *State v. Branch,* supra, the Grand Jury had first considered the evidence and refused to indict. Thereupon the trial court ordered the witness examined in public. Thereafter the Grand Jury again deliberated and brought in the indictment. On appeal the Supreme Court of North Carolina quashed the indictment decreeing as follows:

"There is nothing in our law books, and no tradition of the profession to show that such has ever been the practice or the course of the courts in this State; and *we are of opinion that the ruling of His Honor is an innovation not warranted by the law of the land.*

"The power of the Judge to require a grand jury to come into open court and have the witnesses for the State examined, *is not only opposed to immemorial usage, but is not sustained either by principle or by authority.*

* * *

"How does this innovation upon ancient usage comport with this clause of the Declaration of "Rights? It defeats it in toto. If the man is to be exposed without inquiry as to the sufficiency of the evidence, to the scandal and disgrace of a trial in public, it may as well be done on the information of the State's Solicitor; for *the protection of a grand jury amounts to nothing if the citizen is to be first exposed to scandal and disgrace by a public examination of the witnesses on the part of the State,* in order to see whether he ought to be exposed to the scandal and disgrace of being tried in public on a criminal charge; and, *if upon the public examination of the witnesses for the State he has no right to cross-examine and no right to offer witnesses to contradict the witnesses of the State, or to prove their bad character, and to be defended by counsel, it would be better for him to have a trial at once, upon information, where he has the right 'to confront the accusers and witnesses with other testimony and to have counsel for his defence,' instead of being, in the first place, put in the condition of a victim tied to "a stake, while his reputation is being tortured to death. If the witnesses for the State are to be examined in public, upon the inquiry of the grand jury, in all fairness the accused should be allowed to cross-examine and to offer witnesses to contradict or explain, and to have the benefit* of counsel.

* * *

> "There is not the slightest reason to believe that the practice of examining witnesses before a grand jury in public was ever 'in force and in use in the colony of North Carolina'; very certainly, such has not been the practice in the State of North Carolina, and it must be rejected as inconsistent with the genius of a republician government. *Why examine the witness for the State in public, without the right of cross-examination and of confronting the witnesses, unless it be to expose the accused to scandal and disgrace, else to browbeat the grand jury and influence 'the finding,' not in respect to the case but in respect to the fact?*" (Emphasis added)

Shaftesbury's Case, supra, is the basic, ancient authority for the Anglo-American tradition of pre-trial examination of the grand jury witnesses in secret. There, during the religious struggles, King Charles, his justices and the King's counsel, contrary to all precedent then existing, forced the public examination of the witnesses against Shaftesbury without his having the right to defend or challenge the witnesses. Because the Grand Jury was forced into this procedure that violated traditions ancient even then, it refused to indict and endorsed the Bill *"Ignoramus"* ("We ignore it" *Black's Law Dictionary*). The struggles on the issues apropos to the present petition are well illustrated by the following excerpts from the colloquys between Lord Chief Justice Pemberton, the Foreman of the Grand Jury, and a member named Papillon:

> "L. C. J. Gentlemen of the jury, you hear *it is desired by the king's counsel* (and that we cannot deny) *that the evidence may be publicly given,* that it may not be hereafter in the mouths of any ill minded persons abroad, to scatter any mistakes or untruths

up and down; or to slander the king's evidence, or to say anything concerning them that is not true.

* * *

"Foreman. My Lord Chief Justice, *it is the opinion of the jury, that they ought to examine the witness in private, and it hath been the constant practice of our ancestors and predecessors to do it;* and they insist upon it as their right to examine in private, because they are bound to keep the king's secrets, which they cannot do, if it be done in court."

* * *

"Foreman. My Lord, if your lordship pleases, I must beg your lordship's pardon, if I mistake in any thing, it is contrary to the sense of what the jury apprehend. First, they apprehend that the very words of the oath doth bind them, it says, 'That they shall keep the counsel's and their own secrets:' Now, my lord, there can be no secret in public; the very intimation of that doth imply, that the examination should be secret. . ."

"Mr. Papillon. Your lordship is pleased to say, that it hath been the common usage and practice; sometimes, *my lord, we have heard that that hath been the law of England, that hath never been altered from time to time,* and hath continued so, we desire your lordship's opinion upon that; as we would not do any that may be prejudicial to the king, *so we would not do the least that should be prejudicial to the liberties of the people. . .*"

"* * * Then besides, the jury do apprehend that in private they are more free to examine things in particular, for the satisfying their own conscience, and that without favour or affection; and we hope we shall do our duty."

"L. C. J. Look you, gentlemen, don't talk of this, but consider with yourselves, an examination of proofs

concerning the credibility of the witnesses is not properly before you at this time."

* * *

"Mr. Papillon. *If we are not left to consider the credibility of the witnesses, we can not satisfy our consciences.*"

* * *

"L. C. J. *The Grand Jury are to hear nothing, but the evidence against the prisoner;* therefore for you to enter into proofs, or expect any here, concerning the credit of the witnesses, it is impossible for you to do justice at that rate."

* * *

"The jury withdrew to consider the evidence, and returned the bill *Ignoramus* ("We ignore it" *Black's Law Dictionary*), *upon which the people fell a hollowing and shouting.*

"Att. Gen. My lord, let it be recorded this hollowing and hooping in a court of justice."

IV.

The Federal Courts place great sanctity on the protection of the citizen by the guarantee of indictment by grand jury. *Russell v. United States,* 369 U. S. 749, 82 S.Ct. 1038; *Stirone v. United States,* 361 U.S. 212, 80 S.Ct. 270; *Ex Parte Bain,* 121 U. S. 1, 7 S.Ct. 781. It is therefore respectfully suggested that no Federal Court in a Federal Grand Jury proceeding would sanction as lawful those procedures Petitioner alleges were used against him by the State of Texas.

Texas guarantees to its citizens the protection of indictment by grand jury, *Texas Constitution, Art. I, Sec. 10.* Having adopted such a protection it should be bound to

apply the high Federal standard that would prevent such procedures as are alleged by Petitioner's Motion to Quash. Authority for its being so bound is found in *Griffin v. California,* .... U. S. ...., 85 S.Ct. 1229. (Applying the Federal test against the State of California on commenting on the failure of a Defendant to testify). *Malloy v. Hogan,* 378 U. S. 1, 84 S.Ct. 1489 (Applying the Federal test against the State of Connecticut on self-incriminating tendency of an answer justifying refusal to answer); *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509 (Applying the Federal test against the State of Texas as to the standard for obtaining a search warrant); *Pointer v. Texas,* .... U. S. ...., 85 S.Ct. 1065 (Applying the Federal test against the State of Texas as to the right of confrontation); *Gideon v. Wainwright,* 372 U. S. 335, 83 S.Ct. 792 (Applying the Federal test against the State of Florida on the right of an indigent Defendant to appointment of counsel for his defense); *Mapp v. Ohio,* 367 U. S. 643, 81 S.Ct. 1684 (Applying the Federal test against the State of Ohio of the inadmissibility of evidence obtained by an unreasonable search and seizure); *Stanford v. Texas* (No. 40 October Term, 1964) .... U. S. ...., 85 S.Ct. 507 (Applying against the State of Texas the Federal test as to the sufficiency of the identification of "things to be seized" under a search warrant and prohibiting the issuance of General Warrant).

By these recent decisions this Court has now taken the position that the Fifth and Sixth Amendments to the Constitution of the United States are obligatory on the States. The protection of indictment by a grand jury guaranteed in the Fifth Amendment is therefore binding on the State of Texas. Included in this protection is the fundamental

tradition that the grand jury witnesses shall be examined in private that a defendant may not be pre-judged by the public before he has opportunity to defend. See *Snyder v. Massachusetts,* 291 U. S. 97, 54 S.Ct. 330 which decrees that a State cannot adopt a procedure that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

VI.

The procedures described by Petitioner's Motion to Quash are atavistic, a throwback to the inquisitions "when the Star Chamber and the Court of High Commissions cast their baneful shadow over every English Home." See *In re: Funstan,* 233 N.Y.S. 81; *In re: Gardiner,* 64 N.Y.S. 760 and *People v. Naughton,* 7 Abb. Prac. N.S. 421. They are analogous to Soviet procedures where the formal trial is but an appeal from the pretrial investigation. See Foot Note 9 to *Escobedo v. Illinois,* 37 U. S. 478, 84 S.Ct. 1758, 1763.

To examine the prosecution witnesses in public before television cameras and radio recorders without the Petitioner having the right to counsel and the right to defend is to use the inquisitorial system of criminal justice. But the States are forbidden by the Fifth and Fourteenth Amendments to adopt or use the inquisitorial process. *Malloy v. Hogan,* 378 U. S. 1, 7, 84 S.Ct. 1489, 1493 ("The marked shift to the Federal standard in State cases began with *Lisenba v. California,* 314 U. S. 219, 62 S.Ct. 280 * * * The shift reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. * * * The Respondent sheriff concedes in its brief

that under our decisions * * * the accusatorial system has become a fundamental part of the fabric of our society, and hence, is enforcible against the States.") *Rogers v. Richmond,* 365 U. S. 534, 541, 81 S.Ct. 735, 739 ("An underlying principle in the enforcement of our criminal law" [is] that ours is in accusatorial system and not an inquisitorial system.") See also *Griffin v. California,* .... U. S. ...., 85 S.Ct. 1229; *Murphy v. Waterfront Commission of New York Harbor,* 378 U. S. 52, 84 S.Ct. 1594 and *Escobedo v. Illinois,* supra.

VII.

The Motion to Quash alleged that the unusual procedures described therein had never before been used in a felony prosecution in Harris County, Texas, or the State of Texas (Tr. 20-21). To use them against Petitioner is to deny to him the equal protection of the law. Equality of procedures without invidious discrimination is a part of the equal protection clause. *Chambers v. Florida,* 309 U.S. 227, 60 S.Ct. 472; *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. 585. In the *Griffin Case* this Court decreed:

> "Providing equal justice for poor and rich, weak, and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the royal concessions of Magna Charta: 'To no one will we sell, to no one will we refuse, or delay, right or justice. * * * No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land.' These pledges were unquestionably stey toward a fairer and more nearly equal

> application of criminal justice. In this tradition, our own constitutional guarantees of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned 'stand on an equality before the bar of justice in every American court.' "

By the abnormal procedures Petitioner was in practical effect publicly tried and convicted in a proceeding in which he was affirmatively denied the fundamental right to defend.

CONCLUSION AND PRAYER

On the facts and authorities presented the reasons for granting the Writ of Certiorari may be summarized as follows:

(1) For a state court to deny the right to make proof in support of Federal Constitutional claims is to strike at the heart of the protections of the Constitution of the United States.

(2) The procedures used against Petitioner, if allowed to become precedent, would enable a prosecuting attorney to circumvent the protections inherent in the guarantee of indictment by grand jury.

(3) The procedures used against Petitioner, if allowed to become precedent, would set the pattern for an inquisitorial system of criminal prosecution in which the defendant in practical effect would be tried and convicted without the opportunity to defend.

WHEREFORE, Petitioner respectfully prays that this Honorable Supreme Court of the United States grant the Writ of Certiorari to correct the errors of the Honorable Court of Criminal Appeals of the State of Texas and of the trial court whose actions it affirmed.

Respectfully submitted,

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APPENDIX "A"

CLEM McCLELLAND, Appellant
No. 37,380 vs. - - - - APPEAL FROM
THE STATE OF TEXAS, TRAVIS COUNTY
Appellee

OPINION

The appellant was convicted of the offense of Conversion from an Estate, and his penalty was assessed at 10 years confinement in the State Penitentiary.

The appellant, the former Probate Judge of Harris County, Texas, was jointly indicted with Jerry S. O'Brien. A severance having been granted, O'Brien's case was tried in Harris County where he was convicted and the conviction was upheld by this Court on appeal, 376 S.W.2d 833. The appellant was granted a change of venue and was tried before the Honorable Mace B. Thurman, Judge of the 147th District Court, of Travis County, Texas.

Gordon Robert Von Stroh, a nonresident of Texas, while in police custody, committed suicide. After the death of Von Stroh, Captain Cecil Priest, of the Houston Police Department, had a telephone conversation with the appellant McClelland, who was then Probate Judge, to determine what should be done with the property of Von Stroh. As a result of the telephone conversation, the appellant sent Jerry S. O'Brien to the Police Department to take charge and possession of the property of the deceased. McClelland informed Captain Priest that the family of the decedent, who lived out of the state of Texas, would not need to employ an attorney to care for matters of Von Stroh's estate. Jerry S. O'Brien who was appointed

as temporary administrator of the decedent's estate, was not a lawyer, and O'Brien was not represented in the estate by an attorney.

The day following the death of Von Stroh, Mr. Russell E. Dahl, the husband of the decedent's sister, came to Houston from Oregon to make funeral arrangements. While in Houston, Dahl visited McClelland's office in the courthouse and was informed by McClelland that Jerry S. O'Brien, who McClelland said was very competent, would be appointed to represent the decedent's estate. Dahl later met O'Brien and gave to him certain personal effects of the deceased which had already been delivered to Dahl. The deceased was buried in Houston. Dahl paid all of the funeral expenses and made a claim against the Von Stroh estate for $1,706.18, which claim was reflected on the inventory filed in the Probate Court. The signature of the appellant on the Court's order, approving the inventory, appraisement and list of claims, appears upon the same sheet of paper below the list of claims in which Dahl's claim is itemized. Mr. Dahl's claim was not paid, and he was not reimbursed for the funeral expenses.

The complete probate records of the deceased's estate were introduced into evidence and revealed that the total assets of the estate, including the proceeds of $3,500.00 from an insurance policy, amounted to $3,618.47. Soon after the assets of the estate had been taken into possession of the temporary administrator, and before most of the claims of the estate had been paid, the appellant McClelland entered an order authorizing Jerry S. O'Brien, a temporary administrator's fee of $2,000.00, and an attorney's fee of $500.00. The inventory, appraisement, and list of claims

were made and sworn to by O'Brien on the 2nd day of February, 1960, and were approved by the appellant on the 23rd day of February, 1960. The inventory reflects total assets of the estate in the amount of $102.89. A typed notation of the list of assets reads as follows: "Numerous Insurance policies all of which had lapsed for nonpayment. TRAVELERS LIFE INS.—group policy—which is in controversy but am in hopes of collecting same." The bank account of the Von Stroh estate in the Citizens State Bank reflects that the proceeds of the insurance policy in excess of $3,500.00 had already been paid and collected for the estate and deposited into the bank account on December 28, 1959. There is nothing in the records of the Probate Court to reflect that the proceeds of the insurance policy had been collected until March 23, 1960, when it was shown in the application of the temporary administrator, and on that day the appellant authorized the temporary administrator's fees and attorney's fees in the sum of $2,500.00.

Records from the bank account of the Von Stroh estate, in the Citizens State Bank, Houston, Texas, reflected that two checks, one in the amount of $2,000.00 and one in the amount of $500.00 were drawn on the account by Jerry S. O'Brien, the temporary administrator of the estate, pursuant to the order signed by McClelland. The account was charged with the two checks on March 31, 1960. The $2,000.00 check, payable to Jerry S. O'Brien, bore the notation "Temp. Adm. Fees per court order #67899". The check for $500.00, payable to Jerry S. O'Brien, bore the notation "Attorney fees per court order #67899". The balance of the account remaining after these withdrawals was $1,118.47. Subsequent withdrawals to pay legitimate

claims of the estate reduced the principal on deposit to $283.65.

Records from the same bank revealed that the check for $2,000.00 was deposited into O'Brien's personal account on March 31, 1960.

Records from O'Brien's bank account show that the day following, on April 1, 1960, a check for $500.00 was drawn by O'Brien and made payable to appellant, Clem McClelland. It bore the marginal notation in typed letters "Legal services", and an additional handprinted marginal notation "Insurance matter".

The $500.00 check drawn on O'Brien's account and made payable to the appellant was shown to have been endorsed by McClelland with his signature, and was deposited into his personal account in the Bank of the Southwest in Houston, Texas. The deposit slip reflecting this deposit bears the transit number of the Citizens State Bank and the notation "Legal Services".

During the trial of the case, the state introduced into evidence properly authenticated copies of applications and orders from numerous other estates in which the appellant had, while Probate Judge, awarded attorney's fees to Jerry S. O'Brien. Representative of such cases was the case of Ben Ernest Waite, deceased. The records revealed that the total assets of that estate amounted to $353.06. There were disbursements from the estate by Jerry S. O'Brien as temporary administrator of $10.00 for a bond premium, and $30.00 for court costs. The remaining balance was $313.06. The appellant then entered an order of the Court granting to Jerry S. O'Brien attorney's fees in the amount of $156.53, and temporary administrator's fees in the

amount of $156.53. The two payments entirely depleted the assets of the estate. It was further shown that no attorney was actually appointed to represent Jerry S. O'Brien as temporary administrator of that estate.

The State urged the admission of these numerous other transactions in order to show the intent, system, scheme and design of the appellant McClelland, a probate Judge, as a principal, along with Jerry S. O'Brien, in converting funds from estates under the guise of their being attorney's fees. It was the state's theory that these transactions showed that there had been no mistake in the Court's ordering attorney's fees paid in the instant case, and was also strong evidence of the intent of the appellant to appropriate and convert the money taken from the Von Stroh estate.

The appellant did not testify and offered the testimony of no witnesses in his behalf.

The evidence reveals that the total assets of the estate amounted to approximately $3,700.00. Approximately $900.00 in court costs and claims were paid. McClelland had knowledge of the claim for funeral expenses, which was entered on the inventory filed in the court, and which had the highest legal priority, and it was not paid. The temporary administrator's fee of $2,000.00 and the attorney's fee for $500.00 nearly depleted the estate, and was far from reasonable under the circumstances. The appellant, while Judge of the Probate Court, was paid an attorney's fee by O'Brien. The jury apparently adopted the view that this was actually a payment to appellant from the Von Stroh estate. The evidence of the numerous other transactions, as represented by the case of Ben Ernest Waite, we think, supplied the requisite unlawful intent which is an integral

part of the offense, and showed the absence of any exonerating mistake of fact on the part of the appellant. In the absence of any testimony on behalf of the appellant, the jury was authorized to believe, and apparently did believe that such was the case. As this Court said in the companion case of O'Brien v. State, 376 S.W.2d 833, in which the evidence was substantially identical, the evidence is amply sufficient to show the guilt of the appellant McClelland as a principal, along with Jerry S. O'Brien, of the conversion from the estate of Gordon Von Stroh. The evidence here is amply sufficient for support of the Jury's verdict.

In a voluminous brief, the appellant has presented to this Court five points upon which he relies for reversible error. Most of these points relied upon by appellant have all been considered by this Court recently in the cases of the co-indictee O'Brien, and in the former case of the appellant. O'Brien v. State, 376 S.W.2d 833, and McClelland v. State, 373 S.W.2d 674.

We shall limit our discussion of some of these points in the interest of brevity and in order not to be repetitious.

We shall consider the propositions in the order that they are raised and presented by appellant.

Appellant first contends that the trial court erred in refusing to hear evidence on his motion to quash the indictment before granting a change of venue. We have carefully examined the rather long document in the transcript denominated a Bill of Exception. It is not certified by the trial court as being true and correct, the motion to quash is not included within this bill. It is not even incorporated by reference to the bill. The bill does not

recite and the court does not certify that a motion to quash was made in writing. This complained of error is not before us for review. Ticer v. State, 313 S.W.2d 301; Stephen v. State, 293 S.W.2d 789. We have, however, examined with care appellant's contention and adhere to the view expressed by the majority of this Court in appellant's former case, McClelland v. State, 373 S.W.2d 674, that the trial court's action does not constitute reversible error. This proposition is overruled.

Appellant next contends that the evidence is not sufficient to sustain the conviction of appellant as a principal, and that the state has failed to establish the corpus delicti. We shall pretermit a discussion of this point for the reason that our views and our position are set forth in detail in appellant's former appeal, McClelland, supra, and in our opinion in O'Brien v. State, 376 S.W.2d 833. This contention is without merit.

The third contention brought forward by appellant is that the trial court erred in permitting proof of extraneous crimes during the development of the state's case in chief. We think that this contention was adequately disposed of and fully discussed in O'Brien, supra. Additionally, we are convinced that "intent" is an essential element of the crime of conversion. This contention is without merit.

Appellant's fourth proposition is that the trial court erred in failing to charge upon exculpatory statements. Appellant adopts the view that the check given him by O'Brien with the notation: "Legal services—insurance matter", constituted an exculpatory statement. We have again read the numerous decisions of this court upon the necessity of

a trial court charging upon exculpatory statements. It is our view that the evidence adduced by the state does not come within the purview of either an exculpatory confession nor an admission. We are convinced that the landmark case of Otts v. State, 116 S.W.2d 1084 and the many subsequent decisions following Otts' case, do not bring evidence of the type herein complained of within the realm of exculpatory statements. We find no error in the action of the trial court in refusing appellant's charge upon exculpatory statements.

Lastly, appellant complains of the action of the trial court in refusing to charge the jury affirmatively that they must acquit appellant if they found from the evidence or had a reasonable doubt thereof, that the grand jury could reasonably have ascertained the name or names of the heirs and distributees interested in the Von Stroh estate by the use of reasonable diligence. We do not feel that the evidence warranted such a charge. The testimony adduced by the state from a former member of the grand jury supports the trial court's position. No error is reflected by the action of the trial court in this respect.

The remaining informal bills have also been carefully examined, and we find no reversible error reflected by any of them.

The judgment of the trial court is affirmed.

McDonald, Presiding Judge

(Delivered January 6, 1965.)

CLEM McCLELLAND, Appellant

v.

The State of Texas, Appellee

No. 57,380

Appeal from Travis County

OPINION ON APELLANT'S MOTION FOR REHEARING

Appellant takes this Court to task for our original disposition of his contention that the extraneous offenses were not admissible. He says our statement that "intent is an essential element of the crime of conversion" will hereafter make extraneous offenses admissible in numerous cases simply because intent is an essential element of many crimes. Our opinion is not to be so construed. We stated earlier in our opinion the State's theory as to their admissibility. We here observe that Jones v. State, 376 S.W.2d 842, is the authority upon which the trial court admitted the collateral offenses and supports his ruling. He gave the same charge as he gave in Jones v. State, supra.

The motion for rehearing is overruled.

Belcher, Judge

(Delivered March 10, 1965)
Opinion approved by the Court.

APPENDIX "B"

Clem McCLELLAND, Appellant,

v.

The STATE of Texas, Appellee.

No. 35837.

Court of Criminal Appeals of Texas.

June 29, 1963.

On Rehearing Dec. 11, 1963.

Second Rehearing Denied Jan. 15, 1964.

J. Edwin Smith, Jack Rawitscher, Smith & Lehmann, Houston, Skelton, Bowmer & Courtney, Byron Skelton, Jim D. Bowmer and Bob Burleson, Temple, for appellant.

Frank Briscoe, Dist. Atty., Houston, Samuel H. Robertson, Jr., Carl E. F. Dally and Gus Zgourides, Asst. Dist. Attys., Houston, and Leon B. Douglas, State's Atty., Austin, for the State.

DICE, Commissioner.

The conviction is under Art. 1538, Vernon's Ann.P.C., for conversion of an estate; the punishment, ten years.

Trial was in the 27th Judicial District Court of Bell County upon a change of venue from Harris County.

The indictment returned into Criminal District Court No. 5 of Harris County, omitting the formal parts, charged that:

> "* * * on or about the 19th day of December, A.D. 1960, in said County and State, RICHARD H. PUTNEY was the administrator of the estate of Clara L. Currie, deceased, and as such had in his charge the estate, real, personal and mixed, of the said Clara L. Currie, and the said RICHARD H. PUTNEY and CLEM McCLELLAND, acting together as principals, did then and there unlawfully and with intent to defraud the heirs and distributees interested in such estate (the said heirs and distributees being to the Grand Jurors unknown), convert to their own use a part of the property of said estate, to-wit: ten thousand dollars in money, the same being then and there of the value of ten thousand dollars."

Upon the granting of a severance, appellant, Clem McClelland, was, by order of the court, tried first.

The state's proof shows that appellant was the duly elected, qualified, and acting Judge of the Probate Court of Harris County, Texas.

On September 10, 1960, Mrs. Clara L. Currie died intestate, in Harris County, leaving an estate consisting of both real and personal property of the appraised value of approximately $160,000.

On September 16, 1960, Richard H. Putney, appellant's co-indictee and a practicing attorney in the city of Houston, was appointed temporary administrator of Mrs. Currie's estate. His bond in the sum of $25,000 was approved by appellant.

On October 11, 1960, the administration was by appellant's order made permanent and the administrator's bond fixed at $5,000. On October 17, the said Richard

H. Putney qualified as administrator of the estate by taking the oath and executing a bond that was approved by appellant in his official capacity.

Upon the trial, Putney was called as a witness by the state.

He testified that on December 19, 1960, he went to appellant's office and presented to him an application and order which he had prepared for a fee to be paid to him as administrator of the estate. Appellant, at such time according to the witness, acted upon the application by inserting in the space left blank in the order for the amount of the fee the figure $10,000, stating that it was an unusual case and he (Putney) would need assistance with it. He further testified that appellant stated to him that the fee would be divided between them, "an even split", and instructed him to deposit his share to the account of Tierra Grande, Inc., in the Citizens State Bank, of Houston. The witness stated that he proceeded directly from appellant's office to the Citizens State Bank, where he drew a check on the Currie estate for $10,000, of which he deposited $9,500 to his personal account and retained $500 in cash. He related that he then wrote a check for $5,000 on his personal account, which he deposited in the bank to the account of Tierra Grande, Inc., and that he took a duplicate deposit slip for the $5,000 deposit to appellant's office, at which time he did not see him but left the deposit slip on his (appellant's) desk. The witness stated that he furnished appellant with a copy of the application and order for the attorney's fee and that the last time he saw the papers they were on appellant's desk. He also stated that he had no intention of investing in Tierra Grande, Inc.,

at the time of making the $5,000 deposit and that months later, in June, 1962, he received two stock certificates for 2,500 shares, each, in the corporation, from a man by the name of Bryson Martin. He further stated that at the time appellant instructed him to deposit his share in the Citizens State Bank he wrote on a slip of paper: "Tierra Grande, Inc., Citizens State Bank." The slip of paper was introduced in evidence and shown by a handwriting expert to be in appellant's handwriting.

Other evidence and testimony were offered by the state to corroborate the testimony of the accomplice witness Putney.

Appellant did not testify or call any witnesses in his behalf.

Appellant insists that if the evidence be sufficient to corroborate the accomplice, it is insufficient to sustain his conviction as a principal, but, viewed from the state's standpoint, shows him to have been an accomplice to the crime.

With this contention, we agree.

Articles 65-69, V.A.P.C., define who are principals in the commission of an offense.

Article 65, supra, provides that

> "All persons are principals who are guilty of acting together in the commission of an offense."

The succeeding Articles 66-69, supra, prescribe the manner in which one may become a principal in the commission of a crime.

The six definitions prescribed by these articles have been set out by this court in the case of Middleton v. State, 86 Tex. Cr.R. 307, 217 S.W. 1046, as follows:

> "(1) When A. actually commits the offense, but B. is present, knowing the unlawful intent, and aids by acts or encourages by words.
>
> "(2) When A. actually commits the offense, but B. keeps watch, so as to prevent the interruption of A.
>
> "(3) When A. is actually executing the unlawful act, and B. engages in procuring aid, arms, or means of any kind to assist while A. executes said unlawful act.
>
> "(4) When A. actually commits the offense, but B., at the time of such commission, is endeavoring to secure the safety or concealment of A., or of A. and B.
>
> "(5) When A. employs an innocent agent, or by indirect means causes the injury, or brings about the commission of the offense.
>
> "(6) When A. advises or agrees to the commission of the offense, and is present when the same is committed, whether he aid or not."

Of the six ways in which one may be a principal to a crime, two require his presence at the time the crime is committed, and four make him a principal, though physically absent.

[1] Under the statutory definitions of a principal, whether the person be present or not when a crime is committed he must be actually doing something which associates him with the execution of the unlawful act

at the very time it is done, to make him a principal. Schwartz v. State, 158 Tex.Cr.R. 171, 246 S.W.2d 174.

An accomplice is defined in Art. 70 of our Penal Code, as follows:

> "An accomplice is one who is not present at the commission of an offense, but who, before the act is done, advises, commands or encourages another to commit the offense; or
>
> "Who agrees with the principal offender to aid him in committing the offense, though he may not have given such aid; or,
>
> "Who promises any reward, favor or other inducement, or threatens any injury in order to procure the commission of the offense; or,
>
> "Who prepares arms or aid of any kind, prior to the commission of an offense for the purpose of assisting the principal in the execution of the same."

In the early case of Cook v. State, 14 Tex.App. 96, this court, in setting out the distinction between an accomplice and a principal, said:

> "The acts constituting an accomplice are auxiliaries only, all of which may be and are performed by him anterior and as an inducement to the crime about to be committed (Penal Code, Arts. 79 to 85 inclusive); whilst the principal offender not only may perform some antecedent act in furtherance of the commission of the crime, but when it is actually committed is doing his part of the work assigned him in connection with the plan and furtherance of the common purpose, whether he be present where the main fact is to be accomplished or not."

In 2 Branch's Ann. P.C. 2d Ed., Sec. 710, at page 8, it is stated:

> "If the defendant on trial was not present when the offense was committed and was doing nothing in aid of the common design when the offense was committed, he would not be a principal although the facts support the theory that he was both an accomplice and accessory, or a receiver of stolen property, or either."

In Hankamer v. State, 142 Tex.Cr.R. 23, 150 S.W.2d 794, it was held, in a prosecution under Art. 1538, supra, that *the conversion of funds of an estate was complete the moment the administrator formed the intent to use the money for his private personal use and did so use it.*

The facts in the instant case do not show that appellant was present when Putney withdrew the funds from the estate at the bank. Nor is there any proof that at the time Putney withdrew the funds appellant was doing any act in furtherance of their agreement to take the money from the estate.

Under the facts, appellant was not shown to be a principal to the crime of conversion of the estate but was shown to be merely an accomplice thereto.

[2] In this state, an accomplice cannot legally be convicted of a felony as a principal. See: 2 Branch's P.C., Sec. 710, pages 7-9, and cases there cited.

Parnell v. State, 170 Tex.Cr.R., 30, 339 S.W.2d 49, relied upon by the state, is not here controlling, because, as shown in the opinion in the case, the accused was present at the time of the conversion of funds from the corporation.

Middleton v. State, supra, also relied upon by the state, is not here controlling, because in that case the accused was present at the time of the homicide and doing certain acts in furtherance of the conspiracy to kill the deceased.

By formal Bills of Exception Nos. 9, 10, and 11, appellant complains of the court's refusal, prior to ordering change of venue of the cause, to hear evidence in support of three motions filed by him to quash the indictment or to permit him to perfect his bills of exception, by which he alleged that the indictment returned by the grand jury was in violation of Art. 1, Sec. 10, of the Constitution of Texas, and of the Fifth and Fourteenth Amendments to the Constitution of the United States.

By such refusal, the trial court has deprived this court and the Supreme Court of the United States of the opportunity to review appellant's constitutional claim.

In refusing to permit appellant to submit proof in support of the motions, the court erred. Rothschild v. State, 7 Tex.App. 519, and Juarez v. State, 102 Tex. Cr.R. 297, 277 S.W. 1091.

[3-5] Upon another trial, the state should not be permitted to prove that two of the original incorporators of Tierra Grande, Inc., did not appear before the notary public when they signed and acknowledged the articles of incorporation, as such acts were extraneous transactions which had no bearing upon the issues in the case. For the same reason, evidence should not be admitted to show that appellant, as probate judge, had authorized Putney to make certain loans from the estate to third parties and also authorized Putney to execute a check in the amount of $15,000 to Southwest Equities Corporation. That portion

of the administrator's final account showing certain old coins belonging to the estate as being in appellant's possession should not, upon timely and proper objection, be admitted in evidence before the jury. The court should also limit in his charge the jury's consideration of any evidence of extraneous offenses or transactions to the purpose for which it was admitted.

The judgment is reversed and the cause is remanded.

Opinion approved by the court.

MORRISON, Judge (concurring).

It has been suggested that the offense in question was committed when the order allowing the fee was allegedly signed by the judge. This position cannot be sustained because the alleged order does not appear to have been entered in the records of the Probate Court and there is an entire absence of any testimony that it was necessary or that it was ever used to effect the withdrawal of the monies in question; therefore, we cannot base an opinion upon it. Nor can the position be maintained that the money was not appropriated until it found its way into the possession of appellant because this statute could not be violated by appellant who was not a member of a class capable of committing this crime.

While the opinion of this Court may not meet with popular approval, the writer, at least, should not be subject to criticism because I pointed out as early as 1952, in an article which appears in Volume 1 of the Penal Code, that, as I saw it, the Legislature should abolish the distinction between accomplices and principals. More than ten years have passed since such article was published, and the Legislature has not seen fit to change the law.

Holt v. State, 144 Tex.Cr.R. 62, 160 S.W.2d 944, can have no application here because the accused in that case was actively participating in the offense at the time it occurred, just as was Parnell, and neither case involved conversion of the funds of an estate as we have here and as we had in Hankamer v. State, supra.

Regardless of the change, the fact remains that in all cases affirmed by this Court holding the accused to be a principal he was actually doing something at the time of the commission of the offense in the furtherance of its commission.

Whether or not the writer is sound in the above conclusions, three other reversible errors appear in this record, as pointed out in Judge Dice's opinion, with which I concur entirely.

WOODLEY, Presiding Judge (dissenting).

The offense charged was not one which the appellant, acting alone, could commit. He stands convicted for having acted together with Putney who was alleged and shown to be Administrator of the Currie Estate. There was no allegation in the indictment to this effect but the evidence shows that the appellant was the Judge of the Probate Court who appointed Putney as administrator. As Probate Judge he was charged with the responsibility of seeing that Putney performed his duties, and shared with Putney the duty of preserving the property of the estate, that it might be delivered to those lawfully entitled to receive it and to no one else.

The indictment alleged that Putney and the appellant acting together as principals converted to their own use

$10,000.00 in money which was part of the property of the Currie Estate. The court's charge properly instructed the jury to the effect that proof of conversion of $50 or more of the money would be sufficient.

The theory upon which the conclusion is reached that the Judge of the Probate Court was an accomplice rather than a principal to the conversion of a part of the property of the Currie estate is that the offense was committed at the bank and was complete when the administrator "formed the intent to use the money for his private personal use and did so use it."

As to the $5000 belonging to the estate which, pursuant to the conspiracy, finally was appropriated to the use of the Probate Judge, there is no evidence or suggestion that the administrator at any time had the intent to use any part of this $5000 *for his private personal use, or that he did so use it.*

The contention that the appellant was not a principal in the commission of the offense is quite similar to that we overruled in Parnell v. State, 170 Tex.Cr.R. 30, 339 S.W.2d 49.

This is not a simple case where thieves break in and steal property that is in the possession of its owner. Here the door was open by reason of the positions of trust occupied by the conspirators and, in violation of such trust and of the statute, property of others entrusted to their care and custody was converted to their own use and benefit.

As in Parnell v. State, supra, the offense was not committed by a single act.

The money belonging to the Currie estate was under the control of the administrator and was in his possession. He

had the power to use or convert it, but no lawful right to do so without an order of the Judge of the Probate Court.

The administrator retained possession of the $5000 that was appropriated to the personal use of the appellant until it was so converted and appropriated as the appellant and the administrator had agreed.

There was evidence to the effect that the money deposited in the Tierra Grande Inc. account was withdrawn under the appellant's directions beginning the next day for his personal use or benefit.

The *intent* that the funds of the estate be converted to their own use was complete when the judge signed an order and the administrator accepted and acted upon it, the agreement being that $5000 of the amount would go to the judge. The check by which the $10,000 was withdrawn from the checking account of the estate and deposited to the personal checking account of the administrator shows on its face that the court's order was its basis. It bore the notation "One-half attorney's fees, one-half expenses of estate as per court order December 19, 1960."

The appellant made the fraudulent order which authorized the withdrawal under the unlawful conspiracy, and it was accepted. He directed the administrator where his $5000 was to be placed. He was present as that term is used in reference to the law of principals when the offense was committed.

Suppose that the administrator had had the $10,000 belonging to the estate in cash in his pocket and, having obtained the order, had left half of it at a hiding place designated by the judge where he later found it!

Could it be said that the judge was not a principal because he was not present at the hiding place when the money was left there for him?

Stripped of the devious means used to cast an air of legitimacy upon the transaction and to conceal their crime and avoid its consequences, the supposed case is in essence the case before us.

Suppose that having drawn the $10,000 check, the administrator had obtained in cash the part which it was agreed would go to the appellant and had carried it to the appellant. Would this Court reverse because the appellant was not with the administrator when the $10,000 check was drawn?

As we said in Parnell v. State, supra:

> "There is no settled mode in which appropriation of money or property of the principal by the officer authorized to receive and handle it must take place. It may occur in numberless ways, and the appropriation consummated in any manner capable of effecting it.
>
> "In many classes of cases the question as to what acts are sufficient to show an appropriation is one of great difficulty.
>
> "So long as the person entrusted with the money or property of another acts in accordance with the terms of his trust in reference thereto he is not guilty of embezzlement. He may deposit the money of his in the bank in his own name without being guilty of appropriating it. But a withdrawal by him for purposes of his own constitutes appropriation, 16 Tex.Jur. 70; or constitutes evidence of conversion. 16 Tex.Jur. 38, 39."

Holt v. State, 144 Tex.Cr.R. 62, 160 S.W.2d 944, is a case where a conviction for theft by false pretext from one Goolsbee was affirmed, Holt having been present and participated when false representations were made to Goolsbee at Warren, in Tyler County, but was not present when his co-conspirator thereafter extracted $20,000 in money from Goolsbee at Beaumont, in Jefferson County.

This Court declined to follow the view that would narrow the commission of the crime to the very minute the money was delivered and said:

> "We think the correct view is that the time of the crime of theft by false pretext extended from the beginning of the transactions when appellant first visited the Goolsbees until their loot was divided and that the place was in Warren, Tyler County, as well as near the hotel in Beaumont, Jefferson County."

Had the appellant's order been legally proper and genuine, the drawing and cashing of the $10,000 check would not have constituted conversion of property of the estate, or any other offense. It was, however, a fraudulent and unlawful order. Half of the money was to be and was converted to the use of the appellant. There remained the securing of the safety of the conspirators from detection by proper entry in the records of the order of the appellant as probate judge authorizing the pretended attorney's fees without disclosing that the money was to be shared equally with him, and the approval of the administrator's account.

It is true that the probate judge could not commit the offense alone. It is equally true that without the judge's participation the administrator could not have committed

it with any degree of hope that he could escape detection and punishment, and would not have shared the money converted with the judge.

The parties acted together as principals, as did the parties in Parnell v. State. If the appellant was not present as that term is used in applying the law of principals, Parnell was not present when the conversion for which he was convicted as a principal occurred.

If the majority is correct in holding that the appellant was an accomplice to the conversion and not a principal, Parnell was not a principal though he was convicted as such and the conviction was affirmed.

For cases where the defendant whose conviction as a principal was affirmed, though he was not at the time in position to have committed the offense himself and was doing nothing at the time the offense was committed by his co-conspirator other than waiting some distance away to carry out his part in the conspiracy, see White v. State, 154 Tex.Cr.R. 489, 228 S.W.2d 165; Gonzales v. State, Tex.Cr.App. 350 S.W.2d 553; Hill v. State, 135 Tex. Cr.R. 567, 121 S.W.2d 996; Stubblefield v. State, Tex.Cr. App., 334 S.W.2d 150.

The holding of the majority that the appellant was not a principal to the conversion will preclude another trial upon the indictment, hence there is no occasion to consider other claims of error.

I respectfully dissent.

ON STATE'S MOTION FOR REHEARING

McDONALD, Judge.

Most of the opinion reversing this cause on original submission was devoted to the distinction between a principal and an accomplice. The majority opinion held that the appellant was not a principal; that the evidence was insufficient to sustain his conviction as such and viewed from the state's standpoint shows him to have been an accomplice to the crime.

The writer approved the opinion written by Judge Dice on original submission and wrote no opinion thereon. Judge Morrison concurred and Presiding Judge Woodley dissented. I now recede from my original position so far as the appellant being a principal is concerned.

[6] I think that appellant was a principal, rather than an accomplice. I do not agree with Presiding Judge Woodley that Parnell's case, 170 Tex.Cr.R. 30, 339 S.W.2d 49, cited in his dissenting opinion is in point with the case at bar. I say this for the reason that Parnell was present during the course of the conversion. He was present at the Executive Committee Meeting on June 8th, and at the stockholders meeting on August 15th.

I also disclaim Hankamer's case, 142 Tex.Cr.R. 23, 150 S.W.2d 794, cited in our original opinion as authority to support my views therein expressed. Hankamer was an administrator "converting on his own", without any assistance from the county or probate judge. The portion excerpted from his case and cited in the original opinion follows a discussion in his case of the time of various conversions to refute a claim advanced by Hankamer that

limitation had run on his offenses, if any. This Court said:

> "He had unquestionably converted the $66.55 to his own use and benefit before he ever made any payment of the premium on the bonds. The conversion was complete the moment he formed the intent to use the money for his private personal use and *did so use it.*"

No other person was present, nor was any action on the part of any other person required for Hankamer to complete the conversion in his case. He was unlike Putney, the co-principal and administrator in this cause. He was acting on his own. Putney was acting with the appellant, or the appellant with him, they were acting together, as I shall hereinafter set forth. The writer has carefully reviewed all of the cases cited by the State and the appellant, along with numerous other cases dealing with the law of principals and accomplices. Holt v. State, 144 Tex.Cr.R. 62, 160 S.W.2d 944, cited by Presiding Judge Woodley in his dissenting opinion, supports the view that I now entertain. The writer desires to direct attention to Judge Graves' concurring opinion in Holt, supra, in which he cites numerous cases, among them being: Middleton v. State, 86 Tex.Cr.R. 307, 217 S.W. 1046 and Mason v. State, 31 Tex.Cr.R. 306, 20 S.W. 564, which Judge Graves refers to as being "the true doctrine that should be followed" so far as the law of principals is concerned. Judge Simkins wrote the unanimous opinion in Mason's case. I shall not here lengthen this opinion by quoting from either case, but I do feel that both cases support my position. Whether Putney needed the Order from appellant, allowing the $10,000.00 attorney's fee, isn't clear. Appellant did not exercise his statutory duty to conserve and

preserve the funds of the estate, he passively sat by and allowed Putney to withdraw the money. The appellant set Putney in motion to perpetrate the offense just as effectively as Middleton did Osment in the murder case, Middleton, supra. It is true that Middleton struck no blow with the hammer, nor did appellant even touch the pen when Putney cashed the check at the bank, and yet, the two cases are parallel.

Cochrain v. State, 93 Tex.Cr.R. 483, 248 S.W.43, involved an appellant whose part in the transaction was "to pretend to be dead", which he did. In this case Southwestern Life Insurance Company paid out $5,000.00 to Cochrain's wife, based upon a conspiracy that he had died. He, of course, was not present when the money was paid to his wife. He played "dead" and the appellant herein played like Putney was an honest administrator, and he sat back and silently allowed Putney to convert at least $5,000.00 from the Currie estate and place it on deposit for the use of appellant, or in a bank account controlled by appellant. It is quite coincidental that Cochrain's case is even identical to the case at bar as to the sum of money involved, as well as being authority for my position.

[7] The writer feels that we were in error in holding in our original opinion that the trial Court erred in refusing to allow appellant, prior to ordering a change of venue of the cause, to adduce evidence in support of three motions filed by him to quash the indictment or to permit him to perfect his bills of exception, by which he alleged that the indictment returned by the grand jury was in violation of Art. 1, Sec. 10, of the Constitution of Texas, Vernon's Ann.St., and of the Fifth and Fourteenth Amendments to the Constitution of the United States, which complained

of errors appellant has brought forward by formal Bills of Exception Nos. 9, 10, and 11. Art. 1, Sec. 10, Constitution of Texas protects the rights of an accused in all criminal prosecutions. It does not encompass grand jury action. Rothschild v. State, 7 Tex. App. 519, cited in our original opinion was a case involving an allegation that an unauthorized person was present during the deliberations of the grand jury. The case was reversed because the trial court refused to permit proof by the appellant on this issue. The record in the instant case discloses that appellant was permitted to make proof herein on his allegation that unauthorized persons were present at the time the grand jury deliberated. The trial court met the requirement of Rothschild, and that case does not support our original view, from which I now retreat. In Juarez v. State, 102 Tex.Cr.R. 297, 277 S.W. 1091, the trial court refused to permit appellant to make proof that he had been purposely discriminated against in the selection of the grand jury which returned the indictments against him. Appellant herein makes no such claim. (The trial court here did refuse to permit appellant to make an inquiry into what evidence the grand jury considered at the time of the return of the indictment.) It has long been the law that the character of testimony or the quantum of proof had before the grand jury cannot be inquired into on a motion to quash the indictment. Article 506, Vernon's Ann.C.C.P., Note 6, citing numerous cases. The foregoing article of our Code of Criminal Procedure does not provide for quashing as indictment against a Negro because it was found by a grand jury from which all persons of the African race had been excluded because of their race or color. Yet such a procedure to quash has been held to be a timely mode of presenting the objection, under the Constitution and laws

of the United States, as set forth by appellant's able attorneys. However, I do not think these racial discriminatory cases cited by appellant are in point here.

The case of Rideau v. State of Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed2d 663, cited by appellant is not in point as it is bottomed on the refusal of the trial court to grant a change of venue. We have no such question before us in the case at bar. The trial court changed the venue of appellant's case. He was tried in Belton, Texas, approximately 200 miles from Houston, Texas, where appellant alleges the complained of publicity took place.

I shall now direct my attention to what I regard as the reversible errors in this case. My views and my position are that the State's Motion for Rehearing should be denied. In this court's original opinion by the majority, Judge Dice, speaking for the court, said, "Upon another trial, the state should not be permitted to prove that two of the original incorporators of Tierra Grande, Inc., did not appear before the notary public when they signed and acknowledged the articles of incorporation, as such acts were extraneous transactions which had no bearing upon the issues in the case. For the same reason, evidence should not be admitted to show that appellant, as probate judge, had authorized Putney to make certain loans from the estate to third parties and also authorized Putney to execute a check in the amount of $15,000 to Southwest Equities Corporation. That portion of the administrator's final account showing certain old coins belonging to the estate as being in appellant's possession should not, upon timely and proper objection, be admitted in evidence before the jury. The court should also limit in his charge the jury's consideration of any evidence of extraneous offenses or transactions to the purpose for which it was admitted."

Further elaboration as to these matters was not deemed necessary due to the court's disposition of this cause. I feel it will be desirable to elaborate and clarify my position through a more labored discussion of the law applicable and direct attention to the errors I regard as reversible.

The indictment returned on June 20, 1962, alleges that the appellant on or about December 19, 1960, did unlawfully, with intent to defraud, convert to his own use $10,000 in money from and belonging to the Estate of Clara L. Currie.

It is undisputed that the state relies for a conviction upon the withdrawal of $10,000 by Putney's check dated December 19, 1960, drawn on and paid out of the Currie Estate as authorized by the appellant, and the unlawful conversion thereof of any sum of money of over fifty dollars. The state adopted the view in briefing this case.

To support the allegations of the indictment the state called the witness, Putney, who testified on direct examination, that he presented an application to appellant, as Probate Judge, for an order approving attorney's fees in the sum of $10,000; that appellant signed the order approving the application but said instruments were left on the desk of the Judge (appellant) and they were never produced at the trial. The bank records reveal that on presentation by Putney of the $10,000 check, he received $500 in money, deposited $9,500 to his personal account, and then drew a $5,000 check on his personal account which he deposited to the account of Tierra Grande, Inc., shown to be controlled by appellant, and that this money was withdrawn for the benefit of appellant.

On cross-examination, by the appellant of Putney, he testified that he had made approximately 50 odd withdrawals of money from the Currie Estate without a court order from the appellant, aggregating in excess of $25,000, *which he had converted to his own use and had shared none of the proceeds with the appellant.*

The state on re-direct examination, over appellant's objection, introduced evidence of another withdrawal by Putney, pursuant to appellant's oral instruction, of $15,000 on January 24, 1961, for the purchase of stock in the Southwest Equities Corporation.

For the admission in evidence of the said $15,000 stock purchase the District Attorney of Harris County argued to the trial Judge that:

> "We think it is in response to the cross-examination with reference to the defendant's knowledge of withdrawals from the estate without a written order. This is such a transaction. My position is that it is admissible to rebut—that all of the withdrawals that were made without an order were made unknown to the defendant."

Thus, it was the theory of the state that it should be allowed to offer evidence in rebuttal, showing that Putney acted in other transactions upon an oral court order by appellant, other than the single order approving the attorney's fee of $10,000. Over timely and proper objection, the evidence was admitted.

In addition to the $15,000 stock purchase, the state proffered the testimony of Putney about a prospectus and the notation appellant had made on it. In the absence of the jury the testimony shows that Putney had seen a prospectus

of the Southwest Equities Corporation, and that appellant had written on this prospectus: "Mrs. Currie subscribed for 1,000 shares." After objection had been made, the Court then stated that he would not admit the prospectus, but he would permit the notation "which is ascribed to the defendant, that Mrs. Currie subscribed to 1,000 shares." The Court stated: "The Court understands that the purpose of the State here is to show that the witness had purported oral authority in other transactions other than the one involved." The Harris County District Attorney then stated: "Yes, and that such withdrawals were made to the knowledge of the defendant, without proper order of the Court." Then, in the presence of the jury, the witness, Putney, was asked to identify an exhibit, which *he stated was a prospectus of Southwest Equities Corporation, that he had seen it in Judge McClelland's office,* that McClelland instructed him to buy the stock and *that McClelland made the notation on the prospectus: "Mrs. Currie subscribed to 1,000 shares";* that Putney then withdrew the $15,000.00 from the Currie estate and invested it in stock of the Southwest Equities Corporation, pursuant to McClelland's oral instructions. The Court then admitted the portion of the prospectus bearing the above-quoted notation.

Following the withdrawal of the $15,000 from the Currie Estate for the purchase of stock on January 24, 1961, proof was made by the State that there were two substantial withdrawals of money totaling over $100,000 from the Currie Estate in connection with two loans made by Putney. One, in the sum of $40,000.00 to Bayou Production Company on March 28, 1961, and the other in the amount of $61,000.00 to C. W. Calhoun, Trustee, on June 16, 1961, both transactions clearly showing no conversion on

the part of the appellant, but they give a strong inference of wrongdoing on his part and no doubt aroused suspicion on the part of the jury as the District Attorney asked the question: "Does the Probate Code specifically provide for loans to be made from the estates of decedents?", which, although unanswered, no doubt caused appellant material harm by leaving an inference that the appellant had violated the law under the Probate Code. These were loans to third parties. However, I observe that the state had previously on direct examination, adduced from the witness, Putney, that following the events that he described December 19, 1960, that he subsequently make various withdrawals from the account of Clara L. Currie on many occasions without a court order or without permission of the court and that he approximated to the best of his recollection that these withdrawals amounted to $25,800.00 and some odd cents.

I do not think that the evidence was admissible. The State was actually attempting to bolster or to impeach their own witness. Had they ben correctly desirous of introducing this testimony to rebut, then they were rebutting their own witness, which amounts to nothing more than impeaching one's own witness. They did not show surprise nor hostility on the part of the witness, Putney, and I think this evidence was clearly inadmissible. Neither do I think that this testimony was admissible to bolster the state's witness. The state saw fit to adduce upon direct examination testimony which they later regarded as unfavorable to them, and yet they wanted to bolster their own witness with some transactions highly prejudicial to the appellant. The state also was not only getting before the jury evidence which it contended would rebut, but

also "that such withdrawals were made to the *knowledge of the defendant,* without proper order of the Court." If I correctly interpret the view of the state, it was their position that the stock purchased from Southwest Equities Corporation and the two loans, all having been made with an order from the Probate Judge (the appellant), and he having knowledge of such transactions, for he ordered them made, would also refute Putney's testimony that he converted over $25,000.00 to his own use, sharing none of it with appellant. It would in effect charge appellant with knowledge of Putney's misapplications or conversions on 50 odd different occasions. In the face of Putney's testimony about his various independent acts of conversion, I see no similarity in these three transactions, but I do see appellant being greatly prejudiced by this testimony. Here is an estate shown by the record to be worth approximately $160,000.00 in its entirety. Testimony was then admitted showing three transactions, totaling $116,000.00 and the one transaction for $10,000.00 for which appellant was on trial. I think the testimony about these transactions no doubt caused the jury to feel that appellant was probably, along with Putney, out to steal the entire estate and that said testimony was highly prejudicial and inflammatory to appellant's rights to a fair and impartial trial and that it caused the jury to render a verdict for a greater punishment than they would have rendered absent this prejudicial evidence. Viewing the three transactions totaling $116,000.00 in the suspicious light that the jury no doubt saw them, they probably decided that appellant was just a petty thief to only be taking $10,000.00 as charged; so the additional evidence of the one hundred thousand dollars plus transactions removed any doubt from their minds as to

appellant's guilt. The jury probably computed that here was a Probate Judge, with his co-principal, who stole $126,000.00 in four transactions, or about three-fourths of the entire estate of $160,000.00.

Assuming for the sake of argument that the evidence of these three transactions was admissible to prove either intent, system or identity, or in developing the res gestae, so as to bring it within one of the exceptions to the general rule of admissibility as to extraneous offenses or transactions, the trial court imposed no limitations upon his instructions to the jury as to these transactions, over appellant's timely objection. For this error alone the cause should be reversed.

For the reasons stated, the State's Motion for Rehearing is overruled.

MORRISON, Judge (concurring).

Remaining convinced of the soundness of the original opinion holding the appellant to be an accomplice rather than a principal and my concurrence therewith, I would add only the following.

While I agree with the result, I cannot bring myself to agree with the assumption not supported by evidence that appellant's proof as to the unconstitutionality of the grand jury's action must necessarily have come from what occurred within the grand jury room and not from the holding of the highly publicized court of inquiry. We, as a Court, have no authority to make such an assumption against an accused, or to speculate as to the nature or quality of the proof which might have been adduced had the court permitted it. I further take issue with my brother

McDonald in his statement that the constitutional guarantees do not encompass grand jury action.

I viewed Judge DICE's discussion of the proof of extraneous offenses as grounds for reversal as will be seen from my original concurrence herein. I concur in the overruling of the State's motion for rehearing.

WOODLEY, Presiding Judge (dissenting).

It is regrettable that the views of the Judges of this Court as to the controlling principles of law and their application are so divergent that the numerous and lengthy opinions herein will be of little value as legal precedent or as authority in any case other than that before the Court.

The majority opinion on original submission reversed this conviction upon the holding that the evidence showed appellant's guilt as an accomplice, but not as a principal.

[6] Judge McDONALD's opinion on rehearing states his present view that such holding was wrong and that the evidence is sufficient to sustain the conviction of the appellant as a principal. Thus, the conclusion that the evidence is sufficient to sustain appellant's conviction as a principal becomes the majority holding.

[7] The writer concurs in the conclusion of Judge McDONALD that the court in Harris County did not err in refusing to hear testimony regarding what evidence the grand jury considered in returning the indictment against the appellant.

This holding of the majority leaves only the supposed errors on the trial in Bell County which were not relied upon in Judge DICE's opinion as ground for reversal, but

were the basis of the admonition to the trial court not to admit certain evidence and to limit certain evidence "upon another trial."

On original submission there was no occasion for the Court to consider these claims of error because another trial upon the indictment had been precluded by the holding that the appellant was not a principal, as the indictment charged.

The evidence which Judge McDONALD holds inadmissible as showing extraneous offenses relates to property belonging to the Currie Estate and the actions of the appellant as County Judge, and of the administrator Putney in regard thereto. This evidence was admissible. If it showed or tended to show any offense it was not an extraneous offense but the offense charged in the indictment, namely the conversion of property belonging to the Currie Estate by the administrator, the appellant acting with him as a principal.

It is not controlling that the state elected to stand upon the conversion of $50 or more of the proceeds of the $10,000 check. The allegations of the indictment, not the case submitted to the jury, determines what evidence is admissible and what is extraneous.

It is incorrect to assume that the state was limited by the indictment to the proceeds of the $10,000 check drawn on the account of the Currie Estate. The court properly charged the jury that proof of conversion of $50 or more belonging to the estate would be sufficient. In the jury's absence the trial judge stated, in ruling upon an objection: "Gentlemen, the indictment alleges the theft of $10,000

from the estate. It does not say what $10,000 was taken from the estate."

The first reference to the Southwest Equities Corporation transaction was when Putney testified on cross-examination that he had been indicted "on the $15,000 Southwest Equities check." Thereafter the state offered the prospectus and proof regarding the appellant's connection with Southwest Equities Corporation, but the careful trial judge ruling in the absence of the jury admitted only the notation ascribed to the appellant, the check and the testimony of Putney that the appellant told him to issue it but no court order was obtained.

The first reference to a loan made from the Currie Estate was also on Putney's cross-examination regarding a transfer of funds belonging to the estate from a Savings and Loan Association to a checking account when Putney testified: "That was at the time that we were making the loan for the estate."

Also the final account of Putney was introduced as State's Exhibit S-26 wherein the loans and Southwest Equities Corporation $15,000 investment are listed. Also Putney testified on cross-examination about the loans and interest thereon.

The complained of testimony went no further than to show that loans were authorized and made for the Currie Estate.

In view of the above, appellant has no ground to complain.

Much has been written about Putney's testimony elicited by the defense as to withdrawals he made and converted

to his own use which the appellant did not authorize and about which he was not advised.

To make this part of the evidence complete attention is directed to Putney's explanation made and repeated that he drew the money in violation of the law, knowingly, in anticipation of fees and made false statements on the checks "simply to assure myself that I would not have to split any more fees * * * I did not intend to divide any more fees."

Also, the record shows that evidence was elicited by the defense showing that Putney, with the knowledge of the appellant, sold $40,278.24 worth of Texaco Inc. stock belonging to the Currie Estate a month before he obtained a court order to do so. And on his cross-examination Putney testified that he sold U.S. Treasury Bonds belonging to the Currie Estate with the knowledge of the appellant but without obtaining a court order.

I see no error in the failure of the court to limit the evidence mentioned in his charge.

I respectfully dissent from the overruling of the State's motion for rehearing.

APPENDIX "C"

In The 147th Judicial District Court
of Travis County, Texas

NO. 34,134

THE STATE OF TEXAS, Appellee
V.
CLEM McCLELLAND, Appellant

SENTENCE OF THE COURT

On this the 19th day of May, A. D. 1964, this cause being again called, the State appeared by her District Attorney and the defendant Clem McClelland being in open court in person in charge of the Sheriff of Travis County, Texas, for the purpose of having the sentence of the law pronounced against him in accordance with the finding of the court and the judgment of the court heretofore entered in this cause, and the defendant being asked by the court if he had any sufficient reason why the sentence of this court should not be pronounced against him, failed to give such reason; whereupon the court proceeded, in the presence of the said defendant, to pronounce sentence against him as follows:

It is the ORDER of this court that the said defendant, Clem McClelland who has ben adjudged guilty of the offense of the Conversion of an Estate be and he is hereby sentenced to confinement in the State Penitentiary for an indeterminate term of not less than two (2) years nor more than ten (10) years, and that he be taken by the

authorized agent of the State of Texas or by the Sheriff of Travis County, Texas, and by him safely conveyed and delivered to the Superintendent of said State Penitentiary, there to be confined in the manner and for the period aforesaid.

To which action of the Court, the defendant then and there in open court excepted and gave notice of appeal in open court, from the ruling of this Court, to the Court of Criminal Appeals of Texas, at Austin, Texas.

And inasmuch as the said defendant has given notice of appeal herein, the execution of this sentence is deferred to await the judgment and order of the Court of Criminal Appeals of Texas, at Austin, Texas, in this behalf.

Entered this the 19th day of May, 1964.

MACE B. THURMAN, JR.
Judge

APPROVED AS TO FORM:

TOM BLACKWELL
District Attorney

APPENDIX "D"

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS OF TEXAS, AUSTIN, TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 37,380 styled:

CLEM McCLELLAND, Appellant

vs.

THE STATE OF TEXAS, Appellee

judgment of the 147th Judicial District Court of Travis County, was affirmed on January 6, 1965, Appellant's Motion for Rehearing overruled March 10, 1965, Appellant's 2nd Motion for Rehearing overruled without written opinion, on April 21, 1965, and mandate issued May 21, 1965.

THEREFORE, with the overruling of Appellant's 2nd Motion for Rehearing, this Cause was disposed of by this Court on April 21, 1965, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, and the Court of last resort of Texas in criminal cases, and said judgment has now become final on the docket of this Court.

WITNESS my hand and Seal of Said Court, at office, in Austin, Texas this 28th day of June, A. D. 1965.

GLENN HAYNES, *Clerk*
Court of Criminal Appeals of Texas

APPENDIX "E"

NO. 101,112

In The Criminal District Court No._____
Harris County, Texas

THE STATE OF TEXAS
V.
JERRY S. O'BRIEN and CLEM McCLELLAND

DEFENDANT CLEM McCLELLAND'S
MOTION TO QUASH INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, Clem McClelland, and files this, his Motion to Quash the Indictment brought against him in this cause, showing as grounds therefor the following:

I.

Prior to the bringing of the indictment in this cause, and over the objection of the Defendant, The State of Texas, acting through the District Attorney of Harris County, Texas, the Honorable Frank Briscoe, and on the petition, initiation, and instigation of the District Attorney, conducted a so-called "Court of Inquiry" concerning the matters alleged against this Defendant in the indictment. The so-called "Court of Inquiry" was held in public and began on the 14th day of June, 1962, before the Honorable W. C. Ragan, Justice of the Peace of the Justice Court of Harris County, Texas, Precinct One. The so-called "Court of Inquiry" continued throughout the

day of June 14th, throughout the day of June 15th, until the hour of Noon on June 16th, and until the hour of Noon on June 18th. The so-called "Court of Inquiry" being held in public, the witnesses for the State were examined in public by the Honorable Frank Briscoe, District Attorney of Harris County, Texas, and his assistants.

Notwithstanding that the "Court of Inquiry" was inquiring into alleged offenses against the laws of the State of Texas in the processing of various estates by the Probate Court of Harris County, Texas, of which Court the Defendant was Judge, and notwithstanding that the Defendant was subpoenaed and ordered under protest to testify, as a "witness" in said "Court of Inquiry", during the so-called "Court of Inquiry", Defendant was denied the right to know in advance of the "Court of Inquiry", the nature and cause of the accusations to be inquired into, was denied the right of confrontation of the witnesses testifying in the "Court of Inquiry", was denied the right to cross-examine and contradict the witnesses testifying in the "Court of Inquiry", was denied the right to have compulsory process for obtaining witnesses in his favor, was denied the right to rebut the testimony brought by the State, was denied the right to show that no offenses had occurred, and was denied the right to be represented by counsel and to consult with counsel during the proceedings in the "Court of Inquiry."

Long prior to the convening of the "Court of Inquiry", the Grand Jury that brought this indictment against the Defendant had been impanelled and convened on the 7th day of May, 1962, by the Honorable Sam W. Davis, Judge of the Criminal District Court No. 5 of Harris County,

Texas. This Grand Jury was functioning at the time the District Attorney petitioned for the "Court of Inquiry", at the time the "Court of Inquiry" was ordered by Honorable W. C. Ragan, and at all the time that the "Court of Inquiry" was in public session.

Prior to the convening of the "Court of Inquiry" the District Attorney had taken before the Grand Jury two witnesses concerning the investigation of the Probate Court of Harris County, Texas, but no indictment was returned by the Grand Jury prior to the "Court of Inquiry".

As a result of the public examination of the State's witnesses in the "Court of Inquiry", the proceedings in the "Court of Inquiry", and extensive amounts of the testimony in the 'Court of Inquiry" were by newspapers, radio and television published throughout Harris County and large sections of the State of Texas. In addition, the "Court of Inquiry" being public, many members of the public were in attendance at the "Court of Inquiry" and heard the public examination of the State's witnesses.

The conduct of the "Court of Inquiry" and the public examination of the State's witnesses vitiates this indictment because under the Constitution of The State of Texas and the Laws of The State of Texas, and the Constitution of the United States, this Defendant was and is entitled to be charged by an indictment brought only by proper and lawful proceedings of a Grand Jury. Proper and lawful proceedings of a Grand Jury in due course of law of the land and in due process of law require that the examination of the State's witnesses be in the secrecy of the Grand Jury proceedings until formal accusation by indictment is brought according to law. The State's witnesses having been

publicly examined in the "Court of Inquiry" and not in the secrecy of Grand Jury proceedings this indictment has not been brought by a Grand Jury according to the course of the law of the land and has not been brought according to due process of law.

The public examination of the State's witnesses in the "Court of Inquiry" under the circumstances and conditions existing and the State's witnesses not being examined in secret proceedings of the Grand Jury this Defendant has been denied the right to answer for a criminal offense of the grade of felony only on the indictment of a Grand Jury, in violation of the prohibitions of Art. 1, Sec. 10 of the *Constitution of The State of Texas*, and of Amendment V of the *Constitution of the United States*.

II.

The mode and manner in which the "Court of Inquiry" was held, all as alleged above, denied to this Defendant his rights, privileges and immunities guaranteed to him by the *Constitution of The State of Texas*, and by the *Constitution of the United States*. Without waiving this general allegation of the denial of his constitutional rights and privileges, but still insisting on same, and pleading expressly in the alternative, this Defendant shows that the so-called "Court of Inquiry", as conducted and as described above, denied to this Defendant the following constitutional rights, privileges and immunities, and violated the following prohibitions of the *Constitution of The State of Texas* and of the *Constitution of the United States*:

(1) It denied to this Defendant equal rights as guaranteed to him by Article I, Section 3, of the *Constitution of The State of Texas*.

(2) It denied to him the equal protection of the law as guaranteed to him by Amendment XIV of the *Constitution of the United States.*

(3) It denied to him the right to demand the nature and cause of the accusation against him, and to have a copy thereof as guaranteed to him by Article I, Section 10, of the *Constitution of The State of Texas,* and by Amendment VI of the *Constitution of the United States.*

(4) It denied to him the right to be confronted by the witnesses against him as guaranteed to him by Article I, Section 10, of the *Constitution of the State of Texas* and Amendment VI of the *Constitution of the United States.*

(5) It denied to him the right to be represented by counsel and to have the assistance of counsel during the proceedings in the "Court of Inquiry" as guaranteed to him by Article I, Section 10, of the *Constitution of the State of Texas* and Amendment VI of the *Constitution of the United States.*

(6) It denied to him the right to have compulsory process for obtaining witnesses in his favor as guarranteed by Article I, Section 10, of the *Constitution of the State of Texas* and Amendment VI of the *Constitution of the United States.*

(7) It denied to him the privileges and/or immunities of a Citizen of the State of Texas as guaranteed to him by Article I, Section 19, of the *Constitution of the State of Texas* and abridged his privileges and/or immunities as a Citizen of the United States as guaranteed by Amendment XIV of the *Constitution of the United States.*

(8) It denied to him the due course of the law of the land as guaranteed him by Article I, Section 19, of the *Constitution of the State of Texas* and due

process of law as guaranteed to him by Amendment V and XIV of the *Constitution of the United States.*

(9) It denied to him the right, immunity and privilege of answering to a criminal offense of the grade of felony only on the indictment of a Grand Jury in that the traditional Grand Jury procedures of having the State's witnesses examined in the secrecy of Grand Jury proceedings were violated, with the resulting violation of the provisions of Article I, Section 10, of the *Constitution of the State of Texas* and Amendment V of the *Constitution of the United States.*

(10) It inflicted upon this Defendant, prior to formal accusation by indictment of a Grand Jury, cruel and unusual punishment as prohibited by Article I, Section 13, of the *Constitution of the State of Texas* and Amendment VIII of the *Constitution of the United States.*

The violation of the foregoing privileges, rights and immunities, and the denial of them to this Defendant vitiates and voids the indictment, and estops the State to assert the indictment against this Defendant, and estops the State to prosecute this Defendant on-the indictment. In this connection this Defendant shows that the denial of his constitutional rights, privileges, and immunities was brought about by the purposeful, willful and intentional acts and decisions of the State of Texas acting by and through its duly qualified and acting agent and District Attorney of Harris County, Texas, the Honorable Frank Briscoe.

Further in this connection this Defendant shows that in petitioning for, instigating, and conducting the "Court of Inquiry" as described above the Honorable Frank Briscoe, District Attorney of Harris County, Texas, acted under

color of State authority and/or under color of State law. He purposefully, intentionally, and willfully, under color of State authority and under color of State law, instigated, promoted and conducted procedures that denied to this Defendant fundamental rights and constitutional rights guaranteed to this Defendant by the *Constitution of the State of Texas* and the *Constitution of the United States.* The violation of these rights, individually and cumulatively, vitiates and voids the indictment.

III.

Defendant shows that during the "Court of Inquiry" one or more members of the Grand Jury that voted for the indictment attended the proceedings in the "Court of Inquiry." He shows further that one or more members of the Grand Jury that voted for the indictment either by newspapers, by radio, by television, or by other methods, were informed of the proceedings in the "Court of Inquiry" and of testimony and evidence produced before the "Court of Inquiry." Defendant shows that the "Court of Inquiry" constituted undue influences and coercion on the Grand Jury prior to the bringing of the indictment. He shows that the Grand Jury prior to the bringing of the indictment, and at the time of bringing of the indictment, was subjected to the undue influences and coercion produced by the "Court of Inquiry", and was subjected to various and other undue and unlawful influences.

IV.

There was extensive publicity by all of the news media of the county, beginning on or about the 1st day of June, 1962, concerning the affairs of the Probate Court of Har-

ris County, Texas, and related to the Defendant herein, which publicity was substantially incited, stimulated and aggravated by the District Attorney of Harris County, Texas, and by his assistants, and by other State and County officials of Harris County, Texas. Such publicity was precipitated, incited, stimulated and aggravated by the District Attorney and his assistants in examining the State's witnesses in public in a so-called "Court of Inquiry." The publicity resulting, and particularly that publicity resulting from the acts and conduct of the District Attorney and his assistants in conducting the so-called "Court of Inquiry" and in examining the State's witnesses in public prior to indictment, affected, influenced and infected the deliberations of the Grand Jury.

V.

Defendant shows that the so-called "Court of Inquiry" was, by the District Attorney and the Grand Jury, made a part of the Grand Jury proceedings and deliberations in a three-step proceeding as follows:

(1) Before the convening of the "Court of Inquiry", the District Attorney and the Grand Jury brought before the Grand Jury witnesses concerning the affairs of the Probate Court of Harris County, Texas, and of this Defendant.

(2) Then the legal, proper, usual and customary deliberations of the Grand Jury concerning the affairs of the Probate Court of Harris County, Texas, and of this Defendant were adjourned, interrupted, postponed and delayed until a so-called "Court of Inquiry" could be conducted with the State's witnesses being examined in public. One or more of the grand jurors attended the "Court of Inquiry"; those who

did not attend the "Court of Inquiry" were informed of its proceedings and the testimony before it by all of the modern news media and by other means.

(3) Next, the "Court of Inquiry" was recessed and the Grand Jury was reconvened when the Grand Jury again took under consideration the investigation of the affairs of the Probate Court of Harris County and of this Defendant, and returned this indictment against this Defendant without the testimony of any further witnesses.

These procedures constituted unlawful and unconstitutional Grand Jury procedures in violation of the laws and *Constitution of the State of Texas* and of the *Constitution of the United States.*

VI.

Defendant shows that for many decades in all types of felony accusations the District Attorney's Office of Harris County, Texas, has used the usual, proper, customary and traditional grand jury procedures wherein the examination of the State's witnesses was in the traditional secrecy of grand jury sessions. To the best of Defendant's knowledge and belief the three-step procedure used by the District Attorney's Office in the bringing of the present indictment has never before been used in Harris County, Texas, or in the State of Texas. Defendant shows that such procedures deprive him of due process of law and the due course of the law of the land under the laws and *Constitutions of the State of Texas and of the United States,* and deprive him of the equal protection of the laws, in violation of the provisions of the laws and *Constitutions of the State of Texas and of the United States.*

VII.

Because of the three-step procedures as described in Paragraph V, *supra,* the indictment brought in this cause is not an indictment by Grand Jury, for the usages, customs and traditions of Texas Jurisprudence, Federal Jurisprudence and English Jurisprudence are that the State's witnesses shall be examined in secrecy in grand jury proceedings and not publicly examined as was done by the District Attorney, a state official, in this cause. For such reason the indictment should be quashed and this cause dismissed. The constitutional guaranty of the State of Texas, Article I, Section 10, guarantees to this Defendant that he shall not be held to answer for a criminal offense of the grade of felony "unless on an indictment of a grand jury." As previously stated, this indictment is not the indictment of a Grand Jury according to the traditions, customs and usages of grand jury procedures. In this connection the Defendant again shows and urges that public examination of the State's witnesses and the use of the three-step procedures described in Paragraph V, *supra,* was deliberately instigated by the District Attorney and was an abuse by him of the laws of the State of Texas.

VIII.

Defendant further shows that the indictment should be quashed for the reason that the District Attorney purposely and intentionally instigated the "Court of Inquiry" and the public examination of the State's witnesses in the "Court of Inquiry" without the Defendant having the right of cross-examination, rebuttal, contradiction, calling witnesses in his own behalf and the representation of coun-

sel in the "Court of Inquiry", all with the purpose and intent of prejudicing the public of Harris County, Texas, and the potential jurors of Harris County, Texas, against the Defendant, and with the additional purpose and intent of creating conditions in Harris Couty, Texas, and a climate of public opinion in Harris County, Texas, prejudical to the Defendant which would make it impossible for the Defendant to have and obtain a fair and impartial trial and a fair and impartial jury in Harris County, Texas, which is the county where Defendant resides, and the county where the offense is alleged to have occurred. Such acts and conduct on the part of the District Attorney deprives the Defendant of due process of law, the due course of the law of the land, and the equal protection of the laws.

In this connection Defendant shows that under the due course of the law of the land he was entitled to be tried for the alleged offense in Harris County, Texas, the county of his residence and the county where the alleged offense is alleged to have occurred. He was further entitled, under the law of the land, to have a fair and impartial trial and a fair and impartial jury in said County of Harris. The purposeful and intentional acts on the part of the District Attorney have deprived Defendant of such rights.

IX.

As further grounds for quashing this indictment, the Defendant shows that in the "Court of Inquiry" the District Attorney and his assistants purposely and intentionally introduced testimony in the nature of gossip, hearsay and other type of testimony which would not be in any way admissible against the Defendant in a Court of Law. Question and Answer reports of such inadmissible testimony,

gossip and hearsay were by the various news media of Harris County, Texas, placed in the minds of prospective jurors. In addition Defendant shows that much of the evidence introduced in the "Court of Inquiry" that was prejudicial to Defendant related to alleged criminal derelictions and alleged official misconduct outside the charges of the present indictment. Question and Answer reports of such inadmissible testimony were by the various news media of Harris County, Texas, placed in the minds of prospective jurors. Thus the prospective jurors of Harris County, Texas, have had presented to them evidence that would be inadmissible on a trial of this cause. This was purposely precipitated and brought about by the District Attorney and was an abuse of the Laws of The State of Texas, and was a violation of the *Laws and Constitution of The State of Texas* and of the *Constitution of the United States.* For these further reasons the indictment should be quashed.

X.

Defendant further shows that the violation of due process of law, the due course of the law of the land and of the constitutional privileges and immunities, including the equal protection of the laws, all as guaranteed to him by the *Constitution of The State of Texas* and by the *Constitution of the United States,* whether such violations are considered singly or cumulatively, have been so great and so numerous that their prejudicial effect cannot be removed. For such further reasons the indictment should be quashed.

XI.

The indictment is fatally defective in that it fails to allege sufficient elements of the offense of "conversion of

an estate" in that it fails to allege that the Defendants, Jerry S. O'Brien and Clem McClelland, were in possession and care of the $2,500.00 as Administrators of the Estate of Gordon Robert Von Stroh, Deceased.

WHEREFORE, premises considered, Defendant prays that the indictment be quashed, set aside and vacated and that Defendant be discharged.

Respectfully submitted,

J. EDWIN SMITH
J. Edwin Smith

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Of Counsel

THE STATE OF TEXAS (
)
COUNTY OF HARRIS (

I, the undersigned Clem McClelland, Defendant in the above styled and numbered cause, on oath state that the matters of fact recited in the foregoing Motion are true and correct.

WITNESS my hand at Houston, Harris County, Texas, this 15th day of October, 1962.

CLEM McCLELLAND
Clem McClelland

SUBSCRIBED and sworn to before me, the undersigned authority, on this the 15th day of October, A. D. 1962.

IRENE BOSWELL

(Notary Seal)

Notary Public in and for
Harris County, Texas

CERTIFICATE OF SERVICE

I, the undersigned attorney of record for Defendant, Clem McClelland, certify that a true copy of this Motion was delivered to the Office of the Honorable Frank Briscoe, District Attorney of Harris County, Texas, on the 4th day of December, 1962.

J. EDWIN SMITH

4 December 1962
E. B. DUGGAN
Judge Presiding